LAM KOH SDN BHD

v.

PENTADBIR TANAH JOHOR BAHRU; PLENTONG GRANITE IND SDN BHD (INTERVENERS)

HIGH COURT MALAYA, JOHOR BAHRU
AZHAR MA'AH J
[ORIGINATING SUMMONS NO: 24-1459 OF 2000]
11 APRIL 2001

CIVIL PROCEDURE: *Mode of commencement - Originating summons - Appeal under s. 418 of the National Land Code - Applicability of O. 55 r. 13 Rules of the High Court, 1980 - Whether wrong mode of commencement under O. 55 r. 13 Rules of the High Court, 1980 - Particulars identifying cause of action - Whether must be included in originating summons - Whether insufficient particulars rendered originating summons defective - Whether defect curable - Mohd Nadir A Syed Ahmed & Ors v. Zubaidi Abdul Hamid & Ors*

The defendant had earlier issued an order granting an application by the intervener for a private right of way on some land belonging to the plaintiff. Aggrieved by the decision, the plaintiff filed this originating summons, appealing against the said order. At the outset of the hearing of the plaintiff's application, the intervener raised some preliminary points. The intervener argued that the plaintiff by filing an originating summons in initiating this appeal had embarked on a wrong procedure. The intervener further submitted that the plaintiff failed to state a statement of question for the court's determination to enable the cause of action to be identified.

Held:

[1] The plaintiff's originating summons applying to strike out the defendant's order is in fact an appeal pursuant to s. 418 of the National Land Code ("NLC"). Subsection 2 of s. 418 in no uncertain terms says that such appeal is subject to provision of the law for the time being governing the civil procedure. This law is none other than Rules of the High Court 1980 ("RHC"); and the portion that is relevant to and meets the requirement of s. 418 NLC is O. 55 r. 13 of the RHC.

[2] Following *Mohd Nadir A Syed Ahmed & Ors v. Zubaidi Abdul Hamid & Ors*, the court there in answering the question whether an appeal to the High Court is by way of case stated, petition, or motion; the position of the court was that a person aggrieved has to refer to the RHC, and O. 55 r. 13 is the answer.

[3] Contrary to the submission of the plaintiff that there is no written legal requirement that the plaintiff's application must be made by way of originating motion, O. 55 r. 13 clearly states the mode and procedure of appeal by an aggrieved party. A straight reading of O. 55 r. 13 would show that there is no difficulty in comprehending what is required, to have an appeal properly laid before court.

[4] It is to be noted that the plaintiff's originating summons that purported to initiate the appeal is defective, in that it lacks details and particulars of the question that has to be determined by the court. This defect cannot be corrected as the said deficiency has been present right from the start. Even if the originating summons is to be treated as originating motion, the latter still requires that grounds of the appeal to be set out so as to enable the court to identify the plaintiff's cause of action. This requirement being absent from the plaintiff's originating summons has made it void, and thus becomes a nullity and therefore irreparable.

[Intervener's preliminary objection allowed; Plaintiff's appeal dismissed with costs]

Case(s) referred to:
Isyoda (M) Sdn Bhd v. Low Seong Tek [2000] 4 CLJ 621 ***(refd)***
Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1996] 1 CLJ 396 ***(refd)***
Lee Pet Boon v. Hock Thai Finance Corporation Bhd [1994] 2 MLJ 488 ***(refd)***
Mohd Nadir A Syed Ahmed & Ors v. Zubaidi Abdul Hamid & Ors [1994] 3 CLJ 205 ***(foll)***
Paruvathy Palany v. Sathiaseelan Govindassmy [1999] 5 MLJ 158 ***(refd)***
Re CHS [1997] 3 MLJ 52 ***(refd)***
Saraswathy Devi Nadchatiram v. V Vijayalakshmi Devi Nadchatira [1998] 1 CLJ 1035 ***(refd)***

Legislation referred to:
National Land Code, ss. 394, 418, 447
Rules of the High Court 1980, O. 2 r. 1, O. 5 r. 3, O. 7 r. 3(1), O. 55 r. 13

For the plaintiff - Yahya Chua; M/s Lau & Halmey
For the defendant - Rashid Daud, DPP
For the interveners - Ibrahim Hashim; M/s Hassan Ibrahim & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Azhar Ma'ah J:

The plaintiff is the registered owner of two parcels of land particularly known as Lot 44905 and 44906 Mukim Plentong. The defendant is the Pentadbir Tanah Johor Bahru. Following an application by a company known as Plentong Granite Industries Sdn Bhd the intervener in this case, for a private right of way on the said land pursuant to s. 394 of the National Land Code the defendant on 8 May 2000 issued an order that the intervener's application be granted. The plaintiff being aggrieved by the said order filed this originating summons appealing against the defendant's decision and prayed for the following order:

> 1. Perintah bertarikh 8/5/00 yang diberi oleh defendan membenarkan hak lalu lalang di atas dan melalui tanah-tanah Lot 44905 dan 44906 Mukim Plentong kepunyaan plaintif mengikut permohonan Syarikat Plentong Granite Industries Sdn Bhd dibatalkan dan diketepikan.

At the outset of the hearing of the plaintiff's application the intervener raised some preliminary points. Firstly, this court's attention is drawn to O. 55 r. 13 of the Rules of the High Court 1980 which reads:

> (1) where under any written law an appeal lies from any decision of any person or body of persons to the High Court such appeal shall be made to the High Court in the State where the decision was given by motion setting out the grounds of appeal, supported by affidavit and, if the Court to directs at the hearing, by oral evidence.

By reason of the above provision it is submitted by counsel for the intervener that the plaintiff in filing an originating summon in initiating this appeal have embarked on a wrong procedure. In this regard the court is further referred to the case of *Mohd Nadir A Syed Ahmed & Ors v. Zubaidi Abdul Hamid & Ors* [1994] 3 CLJ 205.

In that case it was *inter alia* decided that "s. 418 does not however provide the procedure for the appeal to the High Court. Does the person appeal to the High Court by way of case stated, petition or motion? As to what procedure should be adopted for the appeal, s. 447 is clear; the person aggrieved has to go the rules of the court, meaning, in the context of today's rules, the Rules of the High Court 1980 to find the procedure and O. 55 r. 13 is the answer."

In the light of the above and further referring to a decision in *Lee Pet Boon v. Hock Thai Finance Corporation Bhd* [1994] 2 MLJ 488 counsel for the intervener urged this court to dismiss the plaintiffs application as this error though procedural is not something that is curable.

The second complaint by the intervener is the non-compliance of O. 7 r. 3 of RHC 1980. It is submitted for the intervener that the plaintiffs have failed to state a statement of the question for the court's determination to enable the court to identify the cause of action. Going by a decision by Dato' Abdul Aziz J in *Isyoda (M) Sdn Bhd v. Low Seong Tek* [2000] 4 CLJ 621 which follows the Court of Appeal's decision in *Saraswathy Devi Nadchatiram v. V. Vijayalakshmi Devi Nadchatira* [1998] 1 CLJ 1035 counsel for the intervener submitted that the plaintiff's appeal should be dismissed on this ground.

In resisting the interveners counsel's preliminary objection solicitors for the plaintiff argued that not only they are appealing against the defendant's decision on point of merits but also on point of procedure. It is submitted that the intervener in initiating and making the application to the defendant has used the wrong form as prescribed in the National Land Code. According to the counsel, form 28C should have been used instead of form 28A. This is in compliance with s. 394 of the National Land Code.

As further point of resistance to the interveners' preliminary objection it is also argued that there is no specific requirement of the law that an appeal under s. 418 of the National Land Code must be by way of originating motion.

By way of an alternative submission counsel for the plaintiffs argued that the alleged defect in the originating summons is something that can be cured under O. 2 r. 1 of the RHC 1980. This proposition is made in reliance on High Court's decision in *Paruvathy Palany v. Sathiaseelan Govindassmy* [1999] 5 MLJ 158 and a Court of Appeal's case in *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1996] 1 CLJ 396. Again, citing a High Court's decision in *Re CHS* [1997] 3 MLJ 52 counsel further urged the court to treat the plaintiff's originating summons as an originating motion as no injustice would be occasioned to the intervener.

The Decision Of The Court

There is no doubt that the plaintiff has taken its grievances to this court in pursuance of its rights accorded under s. 418 of the National Land Code which reads:

(1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any land administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the court.

(2) Any such appeal shall be made in accordance with the provision of any written law for the time being in force relating to civil procedure; and the Court shall make such order thereof as it considers just.

For all intents and purposes the plaintiff's originating summons applying to strike out the defendant's order is in fact an appeal pursuant to the abovementioned provision.

Subsection 2 above in no uncertain terms says that such appeal is subject to provision of the law for the time being governing the civil procedure. This law is none other than Rules of the High Court 1980; and the portion that is relevant to and meets the requirement of s. 418 of the National Land Code is O. 55 r. 13.

Contrary to the submission of the plaintiff's counsel that there is no written legal requirement that the plaintiff's application must be made by way of originating motion, O. 55 r. 13 has very clearly stated the mode and procedure of appeal by an aggrieved party. Reading straight into O. 55 r. 13 one would not find any difficulty in comprehending what is required of him to have this appeal properly laid before the court.

Order 5 r. 3 which the counsel cited in fortifying his argument has no bearing to the present case. Clearly the plaintiffs in initiating and lodging his appeal to this has adopted the wrong mode.

Having arrived at this finding what usually follows is the question as to whether such an error is a kind of defect that can be cured under O. 2 r. 1. In this regard a useful guideline can be gotten from the Court of Appeal's decision in the case of *Saraswathy Devi Nadchatiram v. Vijayalakshmi Devi Nadchatiram (supra)*. In this case the respondent's originating summons which did not contain any details of the question on which the respondent was seeking the court's determination or direction nor did it contain sufficient particulars as to show what her cause of action was in respect of which she was asking relief or remedy was held to be contravening O. 7 r. 3(1) of the Rules of the High Court 1980 and thus fatal to the case. Against the ratio of the above Court of Appeal's decision it is to be noted that the plaintiff's originating summon that purported to initiate the appeal is defective in that it lacks details and particulars of the question that has to be determined by the court. This defect cannot to my mind be corrected as the said deficiency has

been present right from the start. Even if the originating summons is to be treated as originating motion, the latter still require that grounds of the appeal to be set out so as to enable the court to identify the plaintiff's cause of action. This requirement being absent from the plaintiff's originating summons has made the same void, and thus becomes a nullity and therefore irreparable.

For the aforesaid reasons I allowed the intervener's preliminary objection and dismissed the plaintiff's action with costs.